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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
JEANETTE PACKARD, Individually, and as
parent, guardian, and next friend of
ROBERT WHITT, a minor,

Petitioner,

v.

RAMANATHAN PADMANABAN, M.D., and
THE HONORABLE ROGER L. PERRY,
Circuit Court Judge of Logan County, West Virginia,

Respondents.

RESPONDENT RAMANATHAN PADMANABAN, M.D.'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION

TO THE HONORABLE JUSTICES OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION NUMBER 062561

RAMANATHAN PADMANABAN, M.D.
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TO THE HONORABLE JUSTICES OF THE
WEST VIRGINIA SUPREME COURT OF APPEALS:

This Response, denying that Respondent, The Honorable Roger L. Perry, usurped his legitimate powers or abused his discretion with regard to the Orders entered in this civil action on April 4, 2006 and June 26, 2006, is made pursuant to this Honorable Court's request for a response to the Petition for Writ of Prohibition filed on September 20, 2006 on behalf of Petitioner, Jeanette Packard, individually, and as parent, guardian, and next friend of Robert Whitt, a minor.

I.
Statement of Facts

On November 21, 1994, Robert Whitt (hereinafter "Whitt") fell approximately six to seven feet from a swing set while visiting at the home of his grandparents, Robert and Rose Whitt, who lived in Williamson, West Virginia. Whitt Deposition, pp. 3, 8, attached as Exhibit 1. The child's mother, Jeanette Packard, (hereinafter "Packard") and her son resided in Newark, Ohio. Packard deposition p.10, attached as Exhibit 2. Immediately after the fall, Whitt's grandparents took the two-year old to Williamson Appalachian Regional Hospital (hereinafter "WARH"). Whitt depo. pp.12-13. Exh. 1. X-rays taken at WARH revealed a severe, displaced, Type III (on a scale of 1-3) supracondylar (above the condyle of the elbow) fracture of Whitt's left arm. Padmanaban deposition pp. 56, 59, attached as Exhibit 3. Because WARH did not have an orthopedic surgeon on staff, Whitt was transferred, by ambulance, to the services of orthopedist, Ramanathan Padmanaban, M.D., (hereinafter "Dr. Padmanaban") at Logan General Hospital. (hereinafter "LGH"). *Id.* Packard was working at her job in Ohio and could not be reached by the child's grandparents, therefore, Dr. Padmanaban obtained the grandparents' informed consent to allow him to

reduce the fracture either by closed or open reduction.[1] Padmanaban depo. pp. 24-27, Exh. 3; *see also*, consent, attached as Exhibit 4.

Dr. Padmanaban first attempted to reduce the fracture, by closed reduction, however, each attempt at closed reduction resulted in loss of circulation to Whitt's arm. Padmanaban depo. pp. 60-61, Exh. 3. Therefore, after the unsuccessful attempts at closed reduction, in the early morning hours of December 22, 1994, Dr. Padmanaban surgically aligned Whitt's fracture and secured it with four pins placed around the fracture site. *Id.* pp. 67,162, Exh. 3. During the surgery, Dr. Padmanaban also discovered a fracture line that extended through the area of the growth plate of the child's bone. *Id.* at pp. 117-18, Exh. 3.

Dr. Padmanaban continued to treat the fracture until January 14, 1995, when Packard terminated her son's treatment with Dr. Padmanaban, so that her son could be treated closer to their home in Newark. Packard depo. p. 127, Exh. 2. Since terminating Dr. Padmanaban's treatment, Whitt has received orthopedic evaluations on three occasions: the first on June 20, 1995 in Newark, Ohio; the second on January 27, 1999 in Rock Hill, South Carolina; and the third on April 2, 2002 conducted for the purpose of an IME. Deposition John Ogden, M.D., pp. 34, 61, 110, attached as Exhibit 5. Radiologic studies performed in 1999 and 2002 demonstrated the growth plate injury that Dr. Padmanaban observed during the surgery of November 22, 1994. Id. pp. 32-33, Exh. 5; Deposition Robert Scoville, M.D., p. 10, attached as Exhibit 6. Plaintiff's expert, Dr. Ogden, admits that at least some of the growth plate injury from the initial trauma is responsible for the deformity of Whitt's arm. Ogden depo. p. 34, Exh. 5. Irrespective of the growth plate injury, Petitioner claims that Dr. Padmanaban failed to appropriately reduce Whitt's fracture on November 22, 1994, that allegedly caused the deformity of Whitt's left arm.

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[1] After learning that the grandparents consented to treatment of the child's fracture, Packard became upset with the grandparents for failing to consult with her. Packard depo. pp. 103-04, Exh. 2.

II.
Statement of the Case

By Answer filed on August 22, 2003, Dr. Padmanaban denied liability. On December 10, 2003, in response to Dr. Padmanaban's First Set of Interrogatories, Petitioner asserted that she first became aware of Dr. Padmanaban's alleged negligence on January 26, 1999, more than two years before this civil action was filed. *See,* Plaintiffs' Answers to Defendant Ramanathan Padmanaban, M.D.'s, First Set of Interrogatories, at 7(d), attached as Exhibit 7. On December 22, 2003, based on the plaintiffs' interrogatory answers, counsel for Dr. Padmanaban filed a Motion to Dismiss Petitioner's individual claims as barred by the statute of limitations. Petitioner was deposed on May 4, 2004, at which time Petitioner contradicted her prior interrogatory answer with respect to the time when she first suspected Dr. Padmanaban's alleged negligence. Packard depo. pp. 74, 78, Exh. 2. Therefore, Dr. Padmanaban did not bring his Motion to Dismiss on for hearing, as it would be a question of fact for the jury to determine whether the adult plaintiff's claims were barred by the statute of limitations, based on the plaintiff's contradictory testimony.

The initial Time Frame Order in this case was entered on November 6, 2003, setting the trial for July 19, 2004. Time Frame Order, attached as Exhibit 8. Thereafter, the trial was continued, and a second Time Frame Order was entered on July 8, 2004, setting the trial to commence on February 28, 2005. Time Frame Order, attached as Exhibit 9. However, by Order entered February 4, 2005, Respondent Perry indefinitely continued the trial, due to the uncertain health of the plaintiff's expert, Dr. John Ogden.[2] *See,* Order Continuing Trial, attached as Exhibit 10. Thereafter, the parties agreed to a trial date of March 6, 2006. However, after learning that Dr. Padmanaban's expert

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[2] When Dr. Ogden was deposed and was questioned regarding his health, Dr. Ogden denied that he had any condition that would impair his ability to testify at the trial in this case. Ogden depo. pp. 37-38, Exh. 5.

witness was unavailable that week, the circuit court agreed to move the trial date for an additional week, until March 13, 2006.[3] *See,* Agreed Order Continuing Trial, attached as Exhibit 11.

On January 23, 2006 Petitioner filed the Plaintiffs' Portion of the Pretrial Order. However, Petitioner did not identify any issue with respect to informed consent. *See,* Plaintiffs' Portion of the Pretrial Order, pp. 4-5, attached as Exhibit 12. On February 27, 2006, a pretrial conference took place, at which time there was discussion regarding the statute of limitations defense that Dr. Padmanaban first raised in his December 2003 Motion to Dismiss and that was raised again in the Defendant's Amended Pretrial Memorandum. *See,* Defendant Ramanathan Padmanaban M.D.'s Amended Pretrial Memorandum. p. 5, attached as Exhibit 13. On April 4, 2006 the circuit court entered an Order denying Plaintiff's Motion to Include Minor's Future Medical Expenses on Verdict Form. *See,* Exh. 2, attached to Pet. Brief.

Because of several unresolved issues prior to trial, Respondent Perry continued the March trial to November 13, 2006. Respondent Perry also instructed each of the parties to prepare a list of issues that each party believed would be contested at trial. On March 27, 2006 Petitioner, for the first time, raised the informed consent issue. *See,* Plaintiff's Identification of Contested Issues, p. 5, attached as Exhibit 14; and Defendant's Response to Plaintiff's Identification of Contested Issues, pp. 4-5 attached as Exhibit 15. A hearing on those issues took place on May 10, 2006, at which time Petitioner orally moved the circuit court for leave to amend her complaint to add a cause of action for battery/failure to obtain Petitioner's informed consent to her son's surgical treatment. On June 26, 2006, Respondent Perry entered an Order Denying Plaintiff's Oral Motion for Leave to Amend her Complaint. *See,* Order, Exh. 4 attached to Pet. Brief.

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[3] The trial court did not set any deadlines for additional fact or expert witness depositions, but only provided deadlines for mediation and discovery. *See,* Time Frame Order, Exh. 11.

III.
Standard for Issuance of Writ

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va.Code 53-1-1. State ex rel. Shepard v. Holland*, 633 S.E.2d 255, 2006 W.Va. LEXIS 64 (2006), citing, Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va 314, 233 S.E.2d 425 (1977). Furthermore,

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syl Pt. 3, *Shepard, supra*, citing, Syl. Pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

IV.
Discussion

A. Respondent, The Honorable Roger L. Perry, did not exceed his authority or abuse his discretion in finding that the minor plaintiff, Robert Whitt, was not entitled to claim damages for medical expenses incurred prior to the age of majority.

In *Narick v. Glover*, 184 W.Va. 381, 400 S.E.2d 816 (1990), this Court reiterated the long-recognized law followed in this state that:

> [A] personal injury to a minor child gives rise to two causes of action: (1) an action on behalf of the child for pain and suffering, permanent injury, and impairment of earning capacity **after majority**; and (2) an action by the parent for consequential damages, including the loss of services and earning **during minority** and expenses incurred for necessary medical treatment for the child's injuries.

400 S.E.2d at 821(emphasis added), citing *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974); *Richmond v. Campbell*, 148 W.Va. 595, 136 S.E.2d 877 (1964); *Barker v. Saunders*, 116 W.Va. 548, 182 S.E.2d 289 (1935) *Cook v. Virginian Ry. Co.*, 97 W.Va. 420, 125 S.E.2d 106 (1924); *See generally*, 59 Am.Jur.2d *Parent & Child* § 97 (1987); 67A C.J.S. *Parent & Child* §137 (1978). Furthermore, this Court emphasized that "although [the parents' claim] is based upon and arises out of the negligence causing injury to the child, the parent's right of action for consequential damages is **separate and distinct** from the child's right of action for his or her injuries. *Id.* (emphasis added) (internal citations omitted). As such, West Virginia follows the prevailing rule that it is the parent, rather than the child, who holds the cause of action to recover medical expenses incurred on behalf of a minor child, absent exceptional circumstances. *See* e.g., *Garay v. Overholtzer*, 631 A.2d 429 (Md. 1993); *Wilson v. Knight*, 982 P.2d 400 (Kan. App. 1999); *Foster v. Foster*, 142 S.E.2d 638 (N.C. 1965); *In re Ray*, 545 S.E.2d 617 (Ga. Ct. App. 2001) (the right to recover damages for loss of the child's services, and medical expenses vests **solely** in the child's parents which is consistent with the parents' statutory obligation to support their child, including responsibility for the child's medical expenses) (emphasis added); *McGahey v. Albritton*, 107 So. 751 (Ala. 1926); *Gerrard v. Couch*, 29 P.2d 151 (Ariz. 1934); *St. Louis-San Francisco R. Co. v. Perryman*, 211 S.W.2d 647 (Ark. 1948); *Moses v. Akers*, 122.S.E.2d 864 (Va. 1961); *see generally*, L.S. Tellier, Annotation, *What Items of Damages on Account of Personal Injury to Infant Belong to Him, and What to Parent*, 32 A.L.R.2d 1060 §11 (1953, Supp. 1989 & Supp. 1993) (citing to cases from Ala., Ariz., Ark., Cal., Conn., Del., Fla., Ga.,

Idaho, Ill., Kan., Ky., La., Me., Mich., Minn., Mo., Nev., N.J., N.Y., N.C., Okla., Pa., R.I., S.C., Tenn., Tex., Va., W.Va., and Wis.)

Furthermore, most courts have dismissed the parents' claims, including the claims for their minor child's medical expenses incurred during the child's minority, where the parents' claims were time-barred, finding that the tolling statute applicable to the minor's claims did not toll the parents' claims. *See, Garay, supra; Hathi v. Krewstown Park Apartments*, 561 A.2d 1261 (Pa. Super. Ct. 1989); *Krasner v. O'Dell*, 80 S.E.2d 852 (Ga. Ct. App. 1954); *Fess v. Parke, Davis & Co.*, 446 N.E.2d 1255 (Ill. App. Ct. 1983); *Macku v. Drackett Prod. Co.*, 343 N.W.2d 58 (Neb. 1984); *Flynn v. Feil*, 733 P.2d 1327 (N.M. App. Ct. 1987); *Downing v. Brown*, 925 S.W.2d 316 (Tex. App. 1996) aff'd in part and rev'd in part on other grounds, 935 S.W.2d 112 (Tex. 1996); *Perez v. Espinola* 749 F. Supp. 732 (D.C. Va.) (applying Virginia law); *Elgin v. Bartlett*, 994 P.2d 411(Colo. 1999); *Ray v. Scottish Rite Children's Hosp.*, 555 S.E.2d 166 (Ga. Ct. App. 2001); *Vaughan v. Moore* 366 S.E.2d 518 (N.C. Ct. App. 1988) (parents could not waive their damages claims to child, where statute of limitations had run on parents' claims); *Bessette v. Enderlin Sch. Dist.*, 310 N.W.2d 759 (N.D. 1980); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983); see *generally*, John H. Derrick, Annotation, *Tolling of Statute of Limitations, on Account of Minority of Injured Child, as Applicable to Parent's or Guardian's Right of Action Arising Out of Same Injury*, 49 A.L.R.4th 216 § 3 (1986 & Supp. 1992);

This Court has not specifically addressed the issue as to whether the child may recover for medical expenses incurred during minority, where the statute of limitations has run on the parents' claims. However, *Garay, supra*, is particularly instructive and is on point regarding that issue. In *Garay*, the parents and the minor who was injured in a car-pedestrian action each brought suit against the driver of the automobile, five years after the accident. 631 A.2d at 431. The *Garay* court noted that "virtually every court" that addressed the issue of whether the statute of limitations was tolled with respect to the parents' claim for medical expenses during the child's minority, found that it was **not**

tolled.[4] *Id.* at 439 (emphasis added). The reasoning behind that principle is that where the parents and the child's causes of action are separate and distinct and it is not **required** that the parents' claims must be joined in the same action as the claims brought by the minor to recover for the minor's damages, the parents' claim, including the claim for medical expenses incurred during the child's minority, is not tolled. *Id.* at. 436.

Garay also considered whether the parents could waive their right to the child claim recovery for the child's medical expenses incurred during minority. *Id.* at 440. Significantly, the *Garay* court found that "[a]lthough there are a legion of cases allowing parents to waive the right to recover medical expenses to their child, our research disclosed **no** cases [other than two South Carolina federal district court cases][5] whereby a minor may recover medical expenses **after** the parents' claim for those expenses is barred by limitations." *Id.* at 442. (emphasis added). In holding that the parents of a minor could assign or waive their right to recovery for medical expenses incurred during the child's minority, only as long as the waiver or assignment took place **within** the statute of limitations applicable to the **parents'** claims, the court reasoned:

> Permitting the minor plaintiff to sue for the medical expenses on the ground that the parent has waived his claim or has transferred his right to the child may open the way to the allowance of claims which the parent could not himself make successfully. In such a situation, courts generally hold that the child may not recover the medical expenses. For example, when the

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[4] *Garay* recognized that New Jersey statutorily made an exception to that general rule and allowed tolling of the parents' claim for damages as a result of injury to their child. 631 A.2d at 439; *see also, Lauver v. Cornelius*, 446 N.Y.S.2d 456 (N.Y. App. Div. 1981); *Korth v. American Family Ins. Co.*, 340 N.W.2d 494 (Wis. 1983).

[5] In *McNeill v. United States*, 519 F.Supp. 283 (D.S.C. 1981) and *Sox v. United States*, 187 F.Supp. 465 (E.D.S.C. 1960), the courts allowed the child to recover for the medical expenses that were incurred during the child's minority, even though the parents' claims were barred by the statute of limitations.

> parent's claim is barred because the parent was guilty of contributory negligence in permitting the child to play in a place of danger, or by the statute of limitations, recovery for the medical expenses has been denied in the child's suit.[6]

Id., citing, Jacob A. Stein, *Damages and Recovery – Personal Injury and Death Actions* § 228 at 473 (1972); *see also, Vaughan*, 366 S.E.2d 518, *supra.*

Petitioner alleges that Respondent Perry exceeded his authority "by denying the minor plaintiff, Robert Whitt, the right to receive medical expenses incurred prior to his reaching the age of majority." Pet. Brief, p. 1. However, Petitioner does not allege that Respondent Perry abused his discretion or erred in applying the long-established law this Court reiterated in *Narick, supra,* to the facts here. Rather, Petitioner claims that West Virginia case law is "unclear" as to whether the child also possesses a right to recover past medical expenses, so long as there is no double recovery". Pet. Brief, p. 8. However, the few cases that Petitioner cites in support of her argument that either the parent or the child should be permitted to recover for the child's medical expenses incurred during minority, clearly state that either the parent or the child may recover those damages. Nothing is unclear about the long line of precedent cited in *Narick, supra,* that expressly and clearly delineate that there are two separate causes of action in this state, when a child is injured – one belonging to the child for post-majority medical expenses and one belonging to the parents for the child's pre-majority medical expenses. Petitioner simply does not like that law and the effect that a statute of limitations defense has on the Petitioner's individual damage claim. Therefore, Petitioner asks this Court to change the long-established law of this state and allow

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[6] *Garay* recognized that a minor could recover for medical expenses incurred during minority by showing 1)the minor was emancipated, 2)that the minor actually paid for or had the responsibility for paying pre-majority medical expenses; 3) the parents were dead or incompetent; or 4) under the doctrine of necessaries, that the parents were unable or unwilling to provide necessary medical treatment for their child. 631 A.2d at 443.

either the parent or the child to recover medical expenses incurred for the minor's pre-majority medical expenses. *See*, Pet. Brief at 11 ("What the petitioner requests is that the Circuit Court be directed to include on the verdict form a space for the jury to award *the child* his past medical expenses and those to be incurred prior to his reaching the age of majority"). There is simply no reason for this Court to turn a long line of case law on its head and to abandon the prevailing, majority view on this issue.

Importantly, it is not even necessary for this Court to consider this issue at the present time, because it remains to be seen if the jury determines that the Petitioner's individual claims were time-barred when she filed this civil action. In the event the jury believes Petitioner's deposition testimony, rather than her initial interrogatory answers, as to when she suspected Dr. Padmanaban's alleged negligence and finds that her claims were timely filed, Petitioner would be allowed to recover for the medical expenses incurred during the child's minority, and the issue presented here would thus become moot. On the other hand, if the jury determines that Petitioner's individual claims were time barred, and the Petitioner was not permitted to recover any expenses incurred during the child's minority, Petitioner could then appeal that decision. Respondent Dr. Padmanaban has no objection to the trial court permitting a line on the verdict form for the amount of the medical expenses incurred during the child's minority. Assuming, *arguendo*, that on appeal, this Court decided it was appropriate to create new law whereby either the parent or the infant could recover for medical expenses incurred during a child's minority, in spite of the statute of limitations barring the parents' claims, there would be no necessity for a new trial on that issue. Based on the jury's prior determination as to the amount of medical expenses for which Dr. Padmanaban was liable during the child's minority, Petitioner would simply be permitted to recover that predetermined sum, without the need for a new trial on that issue.

However, should this Court determine that it is appropriate to address this issue now, Respondent Dr. Padmanaban responds to Petitioner's argument, *infra*. As discussed in *Garay*, *supra*, West Virginia follows the prevailing view that there are two

distinct and separate causes of action regarding injury to a minor child. Furthermore, as in *Garay*, this state does not require that the parents' claims must be joined in the same action as the child's' claims. *See, Narick*, 400 S.E.2d at 822. Instead of setting aside decade-long precedent, this Court may consider, as the Supreme Court of Maryland did in *Garay*, whether, under certain circumstances, the parents could waive any of their damage claims to their child. However, for the reasons explained in *Garay*, should this Court decide to expand *Narick*, it should not ignore the statute of limitations and, like *Garay* and the numerous other cases cited, *supra*, should require that any waiver take place **before** the statute of limitations runs on the parents' claims. Accordingly, following that reasoning, unless a minor can present evidence of exceptional circumstances, including: 1) the child's legal obligation to pay medical expenses incurred during minority, or actual payment of those expenses; 2) emancipation; 3) death or incompetence of the parents; 4) under the doctrine of necessaries that the child's parents refused or were unable to furnish necessary medical treatment for the minor; or 5) the parents waived their right to claim the child's pre-majority medical expenses **before** the parents' claims were barred by the statute of limitations, this Court should uphold Respondent Perry's Order of April 4, 2006 that bars the minor plaintiff, Robbie Whitt from recovering for medical expenses incurred during his minority, for which Petitioner, in her individual capacity, was responsible.

Petitioner also argues that the practice in this state with regard to infant settlement proceedings supports awarding the infant's medical expenses incurred during minority to the child. However, Petitioner does not distinguish how the claims brought by the parent or guardian, on the child's behalf, is any different than the circumstances in this litigation in which Petitioner filed individual claims and claims on behalf of her child. Petitioner also fails to address the effect on an infant summary proceeding when the parent or guardian's claim is time-barred. Presumably, when there is a settlement, a statute of limitations defense is either not a valid defense, or the defense was never asserted. That is not the case here. Petitioner in effect is asking

this Court to ignore jurisprudence with respect to the statute of limitations, by making a sympathy plea to this Court that would circumvent the result to the Petitioner in the event the jury finds that Petitioner failed to timely file her personal cause of action. While the result may bar recovery of some expenses, in that the Petitioner would not be permitted to recover a portion of damages, to which she otherwise would have been entitled, the result is not unjust. Neither the trial court, nor this Court bears fault for the result, if a party fails to timely file their cause of action.

B. Respondent The Honorable Judge Perry did not abuse his discretion or otherwise err in denying Plaintiffs' Motion for Leave to Amend her Complaint to allow a cause of action for Dr. Padmanaban's alleged failure to obtain informed consent

This Court has recognized the trial court's inherent power to manage its docket, pursuant to Rule 16 of the West Virginia Rules of Civil Procedure. *See, State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994). Moreover, this Court has set standards mandating that the trial courts will bring civil cases, including medical malpractice actions, to final judgment within eighteen months from the time a complaint is filed. *See*, T.C.R. 16.05(c). In keeping with those principles, this Court, in two recent cases, has held that "[l]ack of diligence is justification for a denial of leave to amend where the delay is unreasonable, and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay." *Dunbar Fraternal Order of Police v. City of Dunbar*, 624 S.E.2d 586, 590 (W.Va. 2005), quoting *State ex rel. Vedder v. Zakaib*, 618 S.E.2d 537 (2005). In *Dunbar*, even though there was a stay of discovery, the court found that the plaintiff unreasonably delayed for three and a half years after the answer was filed in seeking to amend the complaint. 624 S.E.2d at 589. Significantly, even though no discovery had been conducted, the court found that the plaintiff had fifteen months between the time the answer was filed and the time the stay went into effect, to seek to amend the complaint, but failed to do so, *Id.* at 590.

In *Vedder, supra*, the plaintiff sought to amend her complaint to add a spoliation of evidence claim against the defendant. 618 S.E.2d at 540. The circuit court found that the plaintiff unreasonably delayed in moving to amend her complaint by waiting for two years and three months from the time the plaintiff was aware that her car had been sold. *Id.*[7] This Court upheld the circuit court's denial of Plaintiff's Motion to Amend, agreeing that the plaintiff was dilatory in pursuing her spoliation claim. *Id.* at 542. The *Vedder* Court specifically found that denial of leave to amend was appropriate "[w]hen the moving party knew about the facts on which the proposed amendment was based but omitted the necessary allegations from the original pleading". *Id.*, quoting, 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1488 (2d ed.1990, *See also, Mauch v. City of Martinsburg*, 178 W.Va. 93, 357 S.E.2d 775, 777 (1987) ("The liberality allowed in the amendment of pleadings [pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure] does not entitle a party to be dilatory in asserting claims or to neglect his [or her] case for a long period of time."); *Consolidation Coal v. Boston Old Colony*, 203 W.Va. 385 508 S.E.2d 102 (1998) (denial of motion to amend was appropriate where plaintiff was dilatory in pursuing a claim for bad faith for sixteen months after the court recognized the plaintiff had the right to amend to join a bad faith action with the original action); and *McCoy v. CAMC*, 210 W.Va. 324, 557 S.E.2d 378 (2001) (denial of motion to amend was appropriate where plaintiff delayed from July to October 2000 in moving to amend complaint based on a new theory of the case.) Thus, pursuant to the precedent set by this Court, a circuit court may consider whether a party has been dilatory in determining whether a party should be granted leave to amend a complaint, pursuant to Rule 15 of the West Virginia Rules of Civil Procedure.

Respondent Perry acted within his legitimate powers and appropriately applied his discretion in denying Petitioner's Motion for Leave to Amend Complaint.

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[7] The circuit court also found that the two-year statute of limitations had run on the spoliation claim. *Id.* at 540.

Respondent Perry was influenced by the fact that this case was filed in [June] 2003, and "has been set for trial and continued because of insufficient time for counsel to prepare their respective cases . . ." Order, attached as Exh. D, Pet. Brief. As Respondent Perry noted, "[f]or too long the issues in this case have been made a moving target that tends to make a trial on the issues appear to be beyond any reasonable horizon." *Id.* Significantly, the circuit court was also influenced by counsel for Petitioner's comments made during the May 10, 2006 hearing that "**the same evidence has been available** to both of us **all along** and it's apparent or at least it became apparent to me as we made final trial preparations that an informed consent is an important issue in this case because the parent did not sign."[8] Transcript of hearing, p. 9-10, attached as Exh. B, Pet. Brief. Thus, Petitioner offered no excusable reason for her delay in seeking to amend.

To date, Respondent Judge Perry has entered four separate Time Frame Orders over a period of three years, with the current trial date of November 13, 2006, now in jeopardy of a continuance. Judge Perry did not abuse his discretion or usurp his power in determining that the parties have had more than sufficient time in the three years, leading up to the date of the May 10, 2006 hearing, to develop their respective cases so that the issues could finally be submitted to a jury for resolution. Petitioner cannot and does not point to any set of facts that allegedly prevented Petitioner from being aware of the informed consent issue. Significantly, even before this case was filed, Petitioner, Jeanette Packard, knew that her son's grandparents signed the surgical consent for her son's surgery. Packard depo. p. 103. In fact, Packard admitted she was upset with Robbie Whitt's grandparents for proceeding with her son's medical treatment without consulting with her. *Id.* at 103-04, Accordingly, Petitioner was personally aware of

[8] Interestingly, although Mr. Mitchell apparently became enlightened regarding the issue of informed consent, that issue has never been apparent to the plaintiff's expert orthopedic surgeon, John Ogden, M.D., as Dr. Ogden has never criticized Dr. Padmanaban with regard to the consent that permitted him to perform Robbie Whitt's surgery.

issues regarding the surgical consent, even before this case was filed three years and four months ago, in June 2003. Nonetheless, Petitioner did not bring the consent issue to the circuit court's attention even as late as January 23, 2006 when Petitioner filed her portion of the Pre-Trial Order. *See*, Plaintiff's Portion of the Pretrial Order, Exh. 6. It was not until March 28, 2006 when Petitioner identified the issue of consent, and even then, Petitioner failed to provide any factual or legal basis with regard to her identified issue as to "[w]hether the plaintiffs can move to have the pleadings amended to conform to the evidence; particularly, on the issue of informed consent." *See*, Plaintiffs' Identification of Contested Issues, para. 5, Exh. 8. Therefore, despite being aware of the facts that Petitioner claims in support of her Motion for Leave to Amend to add a cause of action for failure to obtain informed consent, Petitioner delayed for approximately two years and nine months in bringing that issue to the trial court's attention. Respondent Perry did not abuse his discretion in finding that Petitioner was inexcusably dilatory in attempting to amend her Complaint.

Petitioner argues that Respondent Perry exceeded his legitimate powers "under the circumstances" in denying the Oral Motion for Leave to Amend filed on behalf of the Petitioner. Pet. Brief p. 13. Petitioner argues that "the evidence – or the 'identical factual situation' – is present in this case whether the amendment is granted or not.", so that Respondent would not be prejudiced by the amendment. *Id.* at 12. However, that is not the case. Rather, as is evident from those portions of the hearing transcript that Petitioner failed to highlight in her brief, this Respondent apprised the trial court of the fact that additional discovery **would** be required, in the event the circuit court granted the Motion for Leave to Amend. *See*, Transcript, attached as Exh. B. Pet. Brief, p. 10. Although Petitioner represents that the evidence will be the same, regardless of whether Petitioner is permitted to amend her Complaint, there is no evidence critical of the consent process in this case. Because it is the physician's duty to obtain the patient's informed consent, under the appropriate circumstances, expert testimony would be required to educate the jury regarding the reasonableness of Dr. Padmanaban's

conduct in obtaining the grandparent's consent, under the circumstances, should Petitioner be permitted to amend her Complaint regarding the consent issue. *See, Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982). Significantly, Petitioner's expert, Dr. John Ogden, has prepared two opinion letters, neither of which is critical of the fact that the child's grandparents, rather than a parent consented to the child's treatment for his fracture. *See*, Ogden reports of April 2, 2002 and February 12, 2006, collectively attached as Exhibit 16. In addition, Dr. Ogden has given two separate discovery depositions, one with respect to each of his opinion reports, and Dr. Ogden has never provided any criticism of the consent process.

Moreover, if consent becomes a relevant issue, Respondent Dr. Padmanaban will be unfairly prejudiced and will need to conduct further discovery regarding the individuals who witnessed the consent to the surgical treatment at issue, the individuals who obtained consent for the child's treatment at WARH and during the ambulance transport to LGH, as well as in the emergency department at Logan General Hospital. Furthermore, additional discovery will be required with respect to expert witnesses for each party who will be needed to testify regarding the issue of consent. Therefore, the consent issue will open the door to an entirely different set of facts and witnesses than those relevant to the issue of whether Dr. Padmanaban appropriately reduced the child's fracture. Thus, there are no facts that have recently come to light or that have recently been developed, to justify any delay in seeking to amend the Plaintiff's Complaint during the past three years. Adding an additional issue that will require additional witnesses and discovery, is what the circuit court sought to avoid, so that this case can finally be tried on the existing issues and evidence. Therefore, Respondent The Honorable Roger Perry did not abuse his discretion, much less commit a serious abuse of discretion, in denying Petitioner's Motion for Leave to Amend her Complaint.

C. A Writ of Prohibition is inappropriate with respect to the two Orders presented

Considering the five factors that this Court considers with respect to whether this Court will find cause to consider a Writ of Prohibition, as outlined in Petitioner's Writ, this Court should not issue a rule in support of Petitioner's Writ. *See*, Pet. Brief, §III, p. 6. First, Petitioner admits that she could "wait until trial is concluded and appeal theses issues" *Id at 13.* Significantly, Petitioner does **not** claim:

> 1) that she will be damaged or prejudiced in any way that is not correctable on appeal;
>
> 2) that either of the circuit court's orders were clearly erroneous as a matter of law; or
>
> 3) that either of the orders demonstrates an oft-repeated error or that either manifests a persistent disregard for either procedural or substantive law.

Furthermore, with respect to the Order denying Petitioner's Leave to Amend her Complaint, there is no allegation, nor could there be an allegation that the Order presented a new problem or an issue of first impression for this Court. Accordingly, this Court should deny Petitioner's Writ regarding the Order entered on June 26, 2006.

With respect to the Order entered on April 4, 2006, finding that the child cannot recover for pre-majority medical expenses, this Court has clearly set forth which damages are attributable to the child and which to the parents in a personal injury case involving a minor, so the circuit court's Order does not raise a new problem. Contrary to Petitioner's assertions, this Court has never bestowed on a minor any "right" to recovery for prescription-majority medical expenses. Moreover, an issue of first impression is only presented if this Court expands the existing law and considers whether a parent may waive its right for recovery of pre-majority medical expenses and, if so, whether the statute of limitations serves as a bar to that right, if the waiver does not take place before the statute of limitations runs on the parents' claims. As the jury has not yet

determined that Petitioner's individual claims are time-barred, this Court should also deny Petitioner's Writ with respect to the Order entered on April 4, 2006.

V.

Conclusion

Contrary to Petitioner's assertion, Respondent Ramanathan Padmanaban, M.D. will indeed be unfairly prejudiced, for the reasons discussed, *supra,* should this Court grant Petitioner's Writ of Prohibition. Furthermore, Respondent The Honorable Roger L. Perry did not abuse his discretion nor exceed his legitimate powers and this Court should deny Petitioner's Writ of Prohibition with respect to each of the Orders at issue.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of October, 2006, the appropriate number of copies of the foregoing **Respondent Ramanathan Padmanaban, M.D.'s Response to Petition for Writ of Prohibition** were mailed to the Supreme Court of Appeals via overnight delivery and served upon the following individuals by depositing a copy of the same in the United States mail, postage prepaid, first class, addressed as follows:

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